

**REMARKS/ARGUMENTS**

The Examiner stated that the Declaration filed on May 12, 2006 under 37 CFR 1.131 was ineffective to demonstrate diligence because dates had been redacted from the declaration. Upon submission of the documents used to establish diligence, with unredacted dates, the Examiner stated that the Declaration was ineffective because the Declaration and the Evidence were submitted separately. Claims 1, 6-9, 19, 24-27, 37, and 42-45 are pending in the application but have been rejected under 35 U.S.C § 103 as allegedly being unpatentable over Eylon et al. (U.S. Patent No. 6,757,894) in view of Franco et al., (U.S. Patent No. 6,687,745).

**Eylon et al is Not Prior Art under 35 U.S.C. § 102(e)**

The Examiner relies upon Eylon et al., either alone or in combination with another reference, to reject claims 1, 6-9, 19, 24-27, 37, and 42-45. The applicants are entitled to a patent under §102(e)(1) unless the invention was described in "an application for patent, published under section §122(b), by another filed in the United States before the invention by the applicant for patent[.]" Here, the applicants' effective date is November 6, 2000, and the Eylon et al. application was filed December 28, 2000. Thus, Eylon et al. does not qualify as prior art under §102(e)(1).

Similarly, the applicants are entitled to a patent under §102(e)(2) unless the invention was described in "a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for the purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language[.]" Here, the applicants' effective date is November 6, 2000, and Eylon's application was filed December 28, 2000, and there is no indication that Eylon filed an international application. Thus, Eylon et al. does not qualify as prior art under § 102(e)(2).

All of the Examiner's rejections rely upon Eylon et al, either alone or in combination with another reference. Since Eylon et al. does not qualify as prior art under 35 U.S.C. § 102(e), the applicants respectfully submit that the rejections of Claims 1, 6-9, 19, 24-27, 37, and 42-45 should be withdrawn. The applicants do not provide any opinion regarding the teachings of Eylon et al. because no such opinion is deemed necessary.

### The 131 Declaration

The essential thing to be shown under 37 CFR 1.131 is priority of invention and this may be done by any satisfactory evidence of the fact. MPEP 715.07. The 131 Declaration includes a series of facts, including dates of diligent activity and an assertion of diligence, of character and weight sufficient to establish diligence. As with conception, the applications have made a prima facie showing of diligence, accompanied by facts supporting the declaration.

A declaration is submitted under 37 CFR 1.131 with the same evidence as previously submitted in a declaration by the inventor, including the same evidence used to establish diligent activity, but with unredacted dates. The 131 Declaration establishes a date of invention prior to September 26, 2000. The priority date of Eylon et al. is at best September 26, 2000. It should be noted that the priority date of Eylon et al. could be as late as December 28, 2000, if the Eylon et al. publication is different from the provisional application, filed on September 26, 2000, to which Eylon et al. claim priority.

The 131 Declaration establishes diligence from before September 26, 2000 to November 6, 2001. On November 6, 2001, a patent application was filed, which is a constructive reduction to practice.

The 131 Declaration includes a table with facts corresponding to, for example, the elements of Claim 1. The applicants respectfully assert that the facts provided in the appendices of the 131 correspond to the independent claims 19 and 37, too. Claims 2-18, 20-36, and 38-54, which depend either directly or indirectly from the independent claims 1, 19, and 37, are allowable at least for depending from allowable base claims.

The first 10 pages of Exhibit B have been replaced with pages that are identical except that the dates are not redacted and page numbers have been added for ease of reference.

Exhibits D1 through D5 (collectively, "Exhibit D") are exemplary documents produced by Applicants between September 26, 2000 and constructive reduction to practice on November 6, 2000, which is the date of the provisional to which priority is claimed. These documents are in chronological order which occurred at irregular intervals but without interruption extending from conception to constructive reduction to practice.

Exhibit D is as follows:

- a) D1: Estream 1.0 planning document indicates an un-redacted date of 8/31/2000. The document, as indicated on page 10 of Exhibit B, was entered into the document management system on September 25, 2000, and edited at various times from October 9 to November 1, 2000. Although the un-redacted date in the document is August 31, 2000, the correct date for the edited version provided is November 1, 2000, as

- retrieved from the document management system. The authors apparently did not amend the date within the document.
- b) D2: Estream server component framework low level design indicates an un-redacted date of September 4, 2000. The document, as indicated on page 10 of Exhibit B, was entered into the document management system on September 13, 2000, and edited on September 30, 2000. Although the un-redacted date in the document is September 4, 2000, the correct date for the edited version provided is September 30, 2000, as retrieved from the document management system. The authors apparently did not amend the date within the document.
  - c) D3: Estream set format low level design indicates an un-redacted date of October 3, 2000. The document, as indicated on page 8 of Exhibit B, was entered into the document management system on September 11, 2000, and edited at various times from September 11 to October 3, 2000.
  - d) D4: Estream 1.0 high level design indicates an un-redacted date of October 24, 2000. The document, as indicated on page 10 of Exhibit B, was entered into the document management system via a branch from a prior document on September 12, 2000, and edited on October 25, 2000. Although the un-redacted date in the document is October 24, 2000, the correct date for the edited version provided is October 25, 2000, as retrieved from the document management system.
  - e) D5: Estream 1.0 web server load monitoring applet low level design indicates an un-redacted date of October 30, 2000. The document, as indicated on page 10 of Exhibit B, includes a first date of October 27, 2000, and October 30, 2000, is indicated to be an edit date. The document was entered into the document management system on October 30, 2000, and edited on October 31, 2000.

The applicants respectfully assert the 131 declaration is complete and, using the facts provided herein, the Examiner should determine that the inventor conceived of the claimed invention prior to September 26, 2000, the date of the provisional application to which Eylon et al. claims priority, and diligently reduced to practice from September 26, 2000, to November 6, 2000, the date of the provisional application to which the applicants claim priority.

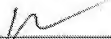
Since the date of conception associated with the pending claims, followed with diligence to constructive reduction to practice, is prior to the best priority date of Eylon et al., the

applicants respectfully submit that Claims 1, 6-9, 19, 24-27, 37, and 42-45 are allowable over the prior art of record.

In view of the foregoing, the claims pending in the application comply with the requirements of 35 U.S.C. § 112 and patentably define over the prior art. A Notice of Allowance is, therefore, respectfully requested. If the Examiner has any questions or believes a telephone conference would expedite prosecution of this application, the Examiner is encouraged to call the undersigned at (850) 838-4305.

Respectfully submitted,  
Perkins Coie LLP

Date: September 3, 2009

  
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